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IN THE

Supreme Court of the United States

October Term, 1916.

No. 427 Certiorari to the United States Circuit Court of Appeals, for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

A. S. GILBERT,
FRANCIS GILBERT,
Of Counsel.

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BRIEF FOR RESPONDENT.

Statement.

This action was brought to enjoin the defendant, the owner of a restaurant in the City of New York, from performing in the restaurant a musical composition entitled "Sweethearts." The application for a final order was made to the District Judge on the bill of complaint, the answer, affidavits and the stipulation as to facts. The application for final order was denied (Opinion of Hand, D. J., fols. 56-60). An appeal was taken to the Circuit Court of Appeals for

the Second Circuit and the final order dismissing the bill of complaint was affirmed (Opinion of Rogers, Circuit Judge, fols. 72-78). The record is now before this Court on a writ of certiorari duly issued.

Pursuant to the order of this Court this case and the case of the *John Church Co. vs. Hilliard Hotel Company and Henri De Martini*, are to be argued together. The two cases require a construction of two separate provisions of the copyright law (Act of March 4th, 1909). The Church Co. case presents a case under Section 1, subdivision (e) of the Copyright Law, and the Victor Herbert case (the one under consideration) presents a case under Section 1, subdivision (d) of the Copyright Law. The decision in both cases must depend ultimately upon the judicial interpretation of the words "for profit" as used in Section 1, subdivisions (d) and (e) above referred to.

Facts.

The respondent conducts a high class restaurant in the City of New York. The business is conducted as any such place of business usually is conducted, for the purpose of serving food and drink to patrons who pay for the price therefor.

> "No charge is made for admission to said restaurant or for the privilege of listening to any performance of music therein and the only remuneration received by the defendant from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There

> is no rule requiring the patrons to order or pay for a minimum amount of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal" (Affidavit of John J. Moran, fol. 32).

No theatrical performance is given in the premises. There is no stage or any appurtenances that are necessary parts of the stage. The singers appear in no costume other than the conventional evening dress costume (Affidavit of John J. Moran, fol. 32). The respondent serves meals to its patrons all during the day, but gives the patrons musical entertainment during certain limited hours; at the lunch period from noon to 2 P. M. the orchestra plays; at the evening dinner hour and at the after-theatre supper period, from 6 P. M. until about 1:30 A. M., the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character.

> "Some of the songs are popular melodies, some are selections from the operas, and some are musical compositions of a little higher musical quality than the popular songs and yet not part of a musical composition as important as an opera" (Affidavit of John J. Moran, fol. 32).

The young lady employed by the respondent purchased a copy of the musical composition en-

titled "Sweethearts," copies of which musical composition were on sale to the general public in the music stores in the City of New York (Stipulation as to facts, fol. 52).

It is admitted that the song "Sweethearts," the performance of which it is here sought to enjoin, was originally a part of the musical comedy or dramatico-musical composition known as "Sweethearts," duly copyrighted (p. 42), and it is also admitted that the vocal number "Sweethearts" is a component and important part of the opera, that it is a link of the dramatic action, and that the success and popularity of that opera are originally due to this vocal number. It is also admitted that a selection containing all of the numbers from the opera "Sweethearts" arranged for the piano, including the song "Sweethearts" here in question, was separately copyrighted as a musical composition and sold by the publisher, G. Schirmer, Inc., one of the petitioners, to all persons desiring to purchase the same.

The said selection containing the song "Sweethearts" was orchestrated and arranged for performance by bands and orchestras and copies of such orchestrations were sold by G. Schirmer, Inc., to all persons desiring to purchase the same, including conductors and leaders of bands and orchestras. The song "Sweethearts" as purchased by the performer employed by the defendant was separately copyrighted and sold as a musical composition in the form attached to the record, marked Exhibit "C" (Insertion between pages 30 and 31). No additional charge was made for meals when the musical entertainment was given (fol. 29).

Synopsis of the Argument.

(A) The vocal number "Sweethearts," as rendered by the performer in the respondent's restaurant, is not a dramatico-musical work but is only a musical composition.

(B) A vocal number originally part of a dramatico-musical work, when separately copyrighted and published as a musical composition, lacking every element necessary to a dramatico-musical work, cannot be classified as a dramatico-musical composition.

(C) The words "for profit" as used in Section 1, subdivisions (d) and (e) of the Copyright Law, must be construed to mean "for pay" or other direct pecuniary compensation.

(D) The performance of a song in a restaurant to which no admission is charged and where the musical entertainment is incidental to the restaurant business, is therefore not a performance "for profit."

POINT I.

The vocal number "Sweethearts" is not a dramatico-musical composition.

It is to be noted at the outset that a clear distinction must be drawn between musical compositions and dramatico-musical works, because pursuant to the provisions of the Copyright Law the owners of the copyrights covering such works acquire different rights. As to a dramatico-musical composition, the owner of the copyright has the exclusive right "to perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce or reproduce it in any manner or by any other method whatsoever" (Copyright Law, Sec. 1, subd. d). As to a musical composition, the owner of the copyright acquires the exclusive right "to perform the copyrighted work *publicly for profit* if it be a musical composition and for the purpose of public performance for profit" (Copyright Law, Sec. 1, subd. e). The public performance of a dramatic work is therefore expressly prohibited by any one other than the owner of the copyright (whether or not the performance is for profit being immaterial). The public performance of a musical composition is not prohibited, however, unless such performance is *for profit.*

Counsel for the petitioners, anticipating the futility of his contention that the performance of the song in a restaurant to which no admission is charged is a performance for profit, ingeniously

asserts the contention that the song itself is a dramatico-musical work and that the public performance thereof, irrespective of whether or not such public performance is for profit, is a violation of the provisions of the Copyright Law.

Considered as a separate publication, the vocal number "Sweethearts" (Exhibit "C") falls far short of the necessary essentials to a dramatic or dramatico-musical work. A dramatic work has been defined as—

> "A composition in prose or poetry usually intended to be acted upon the stage, presenting a story by means of characters speaking and acting in situations contrived to develop a plot, and with such accessories of stage machinery, costumes, etc., as are fit to produce an impression of reality" (Funk & Wagnall Standard Dictionary).

The musical number "Sweethearts" contains no story, no plot, is not intended to be acted, presents no situation, and in fact contains nothing but a simple love theme which requires none of the accessories of the theatre for proper presentation. In fact, in this case, the performer singing the song presented the same dressed in ordinary evening dress costume and without any attempt at theatrical presentation (fol. 32).

The essentials necessary to constitute a song a dramatic piece have been clearly set forth by A. L. Smith, L. J., in *Fuller vs. Blackpool Winter Garden*, 2 Q. B. (1895), 429, at p. 442, as follows:

> "I think that to constitute a song a dramatic piece it must be such a song that for its proper presentation acting and possibly scenery form a necessary ingredient, and that if neither of these can be a requisite to the efficient representation of the song it is not a dramatic piece. It is an entire misnomer to call a mere common, ordinary musical hall song, which required neither acting nor scenery for its production, a dramatic piece, for it is in truth nothing of the kind."

An examination of the song "Sweethearts" fails to disclose any of these requirements essential to a dramatic piece, and the conclusion is irresistible that this song is not a dramatic or dramatico-musical work but is merely a musical composition, the public performance of which if not for profit is not an infringement of the copyright.

POINT II.

The dramatic performing copyright covering the comic opera "Sweethearts" is not infringed by the performance of a musical number originally a part of the dramatic work but subsequently separately copyrighted and sold as a musical composition.

It having been admitted that the song "Sweethearts" was originally a part of the copyrighted dramatico-musical work also known as "Sweethearts," counsel for the petitioners contends that

the performance of the song was an infringement of the dramatico-musical copyright. In presenting this argument, counsel for the petitioners ignores the fact that the song was separately copyrighted and published as a separate musical number. The Copyright Law distinguishes clearly between dramatico-musical compositions and musical compositions. In Section 5 of the Copyright Law it is stated:

> "That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs * * *
>
> "(d) Dramatic or dramatico-musical compositions.
>
> "(e) Musical compositions * * *."

The copyright office rules and regulations further define these classes as follows:

> "(8-d) Dramatic and dramatico-musical compositions such as dramas, comedies, operas, operettas and similar works * * *.
>
> "(9) Dramatico-musical compositions include principally operas, operettas, musical comedies or similar productions, which are to be acted as well as sung. ORDINARY SONGS, EVEN WHEN INTENDED TO BE SUNG FROM THE STAGE IN A DRAMATIC MANNER, OR SEPARATELY PUBLISHED SONGS FROM OPERAS

AND OPERETTAS, SHOULD BE REGISTERED AS MUSICAL COMPOSITIONS, NOT DRAMATICO-MUSICAL COMPOSITIONS.

"(10-e) Musical compositions including either vocal, act or instrumental compositions, with or without words."

(Bowker on Copyright, its History and Law, pp. 162, 163.)

It is conceded that had the petitioners permitted the dramtico-musical composition "Sweethearts" to remain intact, the public performance of any portion thereof would have been an infringement of the copyright. No public performance could ever have been given of any portion of said dramatico-musical work, whether for profit or not. The petitioners, however, sought to increase their revenue by separately copyrighting and selling the musical numbers taken from the opera. By so doing, however, they lost the exclusive performing right therein. It is not claimed that they lost the exclusive dramatic performing rights in those separately published musical numbers which retain their dramatic quality, but merely the exclusive right to publicly perform any such separately copyrighted and published musical numbers having no dramatic quality when considered apart from the opera.

Justice Hand, in his opinion rendered on the dismissal of the bill of complaint succinctly stated the situation as follows (fols. 58-59):

"However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated. On the other hand we now have it on the authority of Church Co. v. Hilliard, supra, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.

This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected, but it was not. The plaintiffs are

> really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."

It is also important to note that a selection containing all of the numbers of the comic opera "Sweethearts" was separately copyrighted, published and sold as a musical composition and that orchestrations thereof were also separately published and sold to all persons including conductors of orchestras and leaders of bands.

Is it not fair to conclude from these facts that a license was thereby granted to the purchasers thereof to publicly perform such selections? Can it reasonably be said that the leader of a band would buy an orchestration of a musical work for any purpose other than for a public performance thereof? Nor is the leader of an orchestra any more likely to purchase a full orchestration for strings, brass, clarinets, tubas, drums, etc., for his private amusement.

POINT III.

The performance complained of was not a performance for profit within the purview of the Copyright Law.

Assuming, as we must, that the song "Sweethearts" is not a dramatico-musical work but only a musical composition, it follows that a public performance thereof is not in violation of the provisions of the Copyright Law unless such pub-

lic performance was "for profit." Counsel for the petitioners contends that the performance having been given in connection with the restaurant business and the restaurant business being conducted for profit, that the performance of the song was therefore also for profit. The language of the Copyright Law does not permit of any such narrow interpretation; in fact the entire purpose of the Act as disclosed by its provisions indicates to the contrary.

The words as used have the significance "for compensation" or "for pay"; that is to say, no public performance may be given of a musical compostion to which an admission fee is charged. But the performance of the musical composition in a restaurant to which no admission is charged is not within this prohibition.

We contend that it is not the purpose for which a free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the Act.

The petitioner argues that if our contention is sustained it will be possible for us to evade the statute by making an additional charge for meals where music is played, or in some other indirect way to charge for the musical performance. If this should be done in any of the ways suggested by counsel for the publishers, it could easily be proved. If we should charge an admission fee to the room where music is played, by a ticket which would entitle the holder to a cup of tea or other light refreshment, the music might well be considered the main thing and the refreshment a mere incident to the performance. If we should

charge more for meals in places where or at times when music is played, this would as easily be proved, and the Court doubtless would hold that we charged for music, and the amount of our charge for the music would be as readily determined as it would in the case of a straight admission fee.

In view of the fact that in the case at bar we made no such extra charge, we can justly say that neither directly nor indirectly have we charged for the music nor derived any profit or income from it. While our purpose in playing was to amuse our guests and attract others, whether the music did in fact accomplish this purpose, it purely conjectural; the song "Swethearts" may have driven more patrons from our dining-room than it attracted thereto.

It is true that the charge to the guest must cover the cost of his food and everything necessarily and reasonably incidental to its preparation and service, but music is not a necessary incident to the service of food, and the guest who pays for a meal cannot insist on music while he eats. Every hotel is under legal obligation to furnish food and necessary personal service to its guests, but no hotel is under any express or implied obligation to furnish music. The time and place of performance, and whether any performance at all is given, rest in the discretion of the hotel. Music is furnished only at certain times and meals are furnished at all hours, with no difference in the charge therefor when music is furnished.

The words "for profit" are expressly defined in Section 1 of the Act, with reference to coin-operated machines, as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit *unless a fee is charged for admission to the place where such reproduction or rendition occurs.*"

It seems reasonable to assume that where the same expression is used twice in the same section of the Act, the legislative intent is the same in each case unless the contrary clearly appears.

The *Sarpy* case, referred to on page 7 et seq. of petitioner's brief, is readily distinguishable from the case at bar. That case was decided under Section 1 of the English Copyright Act of 1883, which is as follows:

> "On and after the passing of this act the proprietor of a copyright in any musical composition first published after the passing of this act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

Reference to the case reveals the fact that there, as here, judicial opinions differ as to what constitutes a gratuitous public entertainment.

In the first place the English statute under which the *Sarpy* case was decided confers much greater rights upon the composer than the American. In England the owner of a copyrighted musical composition may, by printing notice thereof on each published copy, reserve to himself all rights of public performance or representation. The all-important words "for profit" do not appear in the English Act, nor is any equivalent expression used. Hence, any public performance, regardless of whether it is for profit or not, is an infringement. In the United States, however, it is not enough that the performance is public; it must also be for profit.

Secondly, the defendants in the *Sarpy* case claimed to be acting under the permission contained in the notice of reservation which allowed the performance of the music at "gratuitous public entertainments" and "entertainments which are absolutely free." The Court held the defendants to a strict compliance with the terms of this license. But the language of the license differs materially from that of the American Copyright Act. An artist may perform a work "publicly for profit" at a gratuitous public entertainment; and likewise, he may perform gratuitously at a "public" entertainment "for profit." In the first case the performance would constitute, under our law, an infringement by the artist, while under the conditions in the *Sarpy* case it would not; and the givers of the entertainment would be protected both under the *Sarpy* case and under our law. In

the second instance they would be guilty of an infringement both under our law and under the *Sarpy* case.

We submit also that the *Sarpy* case should not be followed because the opinion presents no convincing reasoning in support thereof. The Judges assign as the grounds of their decision that the performance was not a "gratuitous public entertainment": (1) The fact that the performance was paid for by the proprietor of the hotel "with a view of gain"; (2) It was part of the means by which he attracted customers; (3) The public could not go there "without buying some of the commodities which Holland was there to sell; (4) The "music was really part of the operations of the hotel"; (5) "The license cannot justify what was done."

The last reason is inapplicable to the case at bar because the language of the license differs from that of our Copyright Act materially.

The first reason seems altogether inadequate. Does the fact that the proprietor of a hotel paid for the performance of the music, assuming, as the Court does, that he did it "with a view of gain," make any difference in the character of the performance insofar as its being gratuitous is concerned? If the public without restriction had been admitted to the saloon free of charge and without the necessity of buying anything there, could it be said that the performance was nevertheless not a "gratuitous public entertainment" merely because the proprietor of the hotel had to pay for it?

As to the second ground, it is pure speculation, to say the least, to contend that a customer buys a meal because music is performed in the dining-

room. It is much more reasonable to assume that he does so because he is hungry.

The third ground may perhaps be a suitable test for "a gratuitous public entertainment," but it is not a proper test of whether the defendants are performing complainant's music "publicly for profit." The words in our Act can only contemplate a profit derived from the performance of the copyrighted music, not a profit derived from the sale of meals in the dining-room where music is played. When one cannot enter a place were music is being performed without buying something, the entertainment cannot be said to be "gratuitous" or "absolutely free"; and yet the *music* as such is not being performed "for profit" if no admission is charged. There is no profit derived from the performance of the music; the profit, if any, is derived from the sale of the meal.

By reason, therefore, of the difference in the statutes of this country and of England, as well as the circumstances under which the *Sarpy* case was decided, and the insufficiency of the reasoning of the Court in that case, it is respectfully submitted that the decision therein should not be controling here.

Immediately following his reference to the *Sarpy* case, counsel for the petitioner (page 8 of his brief) cites *Weisblatt vs. Bingham* (58 Misc., N. Y., 328) to the effect that a rule similar to to that in the *Sarpy* case was adopted by the New York Supreme Court.

This is misleading. The rule in the *Weisblatt* case is not the law of the State of New York.

The question in the *Weisblatt* case was whether the exhibition referred to was a common show

and therefore required a license, no such license being required for gratuitous entertainments.

The *Weisblatt* case was decided in 1908. In January, 1912, the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People v. Martin* (137 N. Y. Supp., 377), where it was held that a cabaret show in a restaurant was not a public performance for profit and hence required no license.

Again, in the case of *People v. Wacke*, 77 Misc., 196, the Court on a state of facts exactly like the *Weisblatt* case, refused to follow that decision, saying at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore."

Both the *Martin* and the *Wacke* case follow *People v. Royal*, 23 App. Div., 258, which held that a person who hired a room where he illustrated the tricks and devices of gamblers, for the purpose of selling a book, to which exhibition no admission fee was charged, is not engaged in conducting an exhibition. The Court said *the sale of the book,* not the exhibition, was the *principal thing.* So, the sale of meals and not the performance of music, is the source of profit, if any, to the hotel.

POINT IV.

The enumeration in Section 28 of the Copyright Act of certain special cases where music may be publicly performed without the consent of the owner is not exclusive.

Counsel for the petitioners contends that Section 28 of the Copyright Act "indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes and of the classes there enumerated." The portion of Section 28 applicable to this discussion is as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses or octavos by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society provided the performances are given for charitable or educational purposes and not for profit."

Counsel for the petitioners claims that no public performance of a musical work may be given without the consent of the proprietor of the copyright unless it is one of those enumerated in Section 28 above set forth. To so hold would render the provisions of Section 1, sub-division E

meaningless because under that Section a public performance of any musical composition can be given by any one if not for profit.

The Circuit Court of Appeals held in the Hilliard case (221 Federal Reporter, page 229):

> "This proviso must contemplate the charge of an admission fee because if the performance is really not for profit it would be perfectly lawful both under Section 1, subdivision E and under the prior provision of Section 28 itself. We must attribute a more plausible contention to Congress. We think it was to permit certain high class religious and educational compositions to be performed at public concerts *where an admission fee is charged*, provided the proceeds are applied to a charitable or educational purpose."

POINT V.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

If counsel for petitioner is sustained in his contention that every performance of music is for profit, which is given in the hope of attracting trade or business then not only hotels and restaurants but many other forms of human activity will be affected.

If every free performance of music for the purpose of advertising, or attracting business, is "for profit" within the purview of the Act, and no

copyrighted music may be played for such purpose in any place to which the public has access, without obtaining a special license from the owner, a music store may not play copyrighted music for the purpose of selling an instrument or even the music itself. The public is invited to enter the store quite as much as it is to enter a hotel or a theatre.

A lone bugler walking down Pennsylvania Avenue playing any copyrighted musical composition with an advertising placard on his back would infringe the right of public performance for profit as would his employer who thus advertised his business.

Copyrighted music furnished by a political parade organized to attract voters for a candidate for a political office of honor and profit, would infringe. A free concert given by a municipality in a public park would also be an infringement because the musicians receiving pay would be giving a performance for profit. Surely Congress never intended this.

It would seem, therefore, that Congress intended the words "for profit" in Subdivision E to mean a public performance for pay, where the profit, if any, is derived from the music itself and not from some other business to which the music is a mere incident.

It is, of course, no argument against petitioner's contention that it is novel. But there is some significance in the fact that although Subdivision E was enacted in 1897, this is the first case in the United States in which such a claim has been advanced. In the intervening seventeen years there have undoubtedly been countless perform-

ances of copyrighted music, both appellant's and others, under circumstances similar to the case at bar. Apparently there has been a general acquiescence among both the composers and publishers of music in the interpretation of the statute advanced by us. It is respectfully submitted that no valid reason has been urged for unsettling this condition of affairs and applying the Act to situations not intended to be covered by it.

POINT VI.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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